enabling statute, Wis. Stats. § 100.52, and impair their rights to lawfully use telephone solicitation to sell products, goods and services to the public. Plaintiffs have moved for summary judgment because there are no factual issues requiring a trial. Defendants agree that the court has jurisdiction to determine the validity of the administrative rules pursuant to Wis. Stat. § 227.40, that there are no disputes of material fact and that this case should be decided as a question of law cn summary judgment.

Plaintiffs advance eight claims upon which they ask the court to find that the Department exceeded its authority in promulgating Wis. Admin. Code §§ ATCP 127.80—84. These are: (1) the rule treatment of non-profit organizations; (2) the definition of current client; (3) the definition of residential customer; (4) the telephone solicitation registration fee structure; (5) the definition of telephone solicitor; (6) the definition of telephone solicitation as including a "plan or scheme" to encourage sales; (7) the creation of a private right of action; and (8) increased forfeitures and fines. These last two claims arise as a consequence of DATCP's reliance on Wis. Stat. § 100.20(2) as additional enabling authority for its no-call rules.

For the reasons set forth in this Decision, the court upholds the validity of the no-call rules on the first six claims. The court concludes, however, that the rules cannot authorize a private cause of action nor can they permit forfeitures greater than those established by Wis. Stat. § 100.52(10). Although the original legislation, 2001 Wisconsin Act 16, provided a private cause of action for people suffering damages as a result of a no-call violation and established stronger penalties, then-Governor McCallum vetoed those provisions. The Legislature did not override the governor's vetoes, and the

statute must therefore be interpreted as it is now written, including vetoes. When a statute and a rule conflict, the statute prevails.

FACTS

The parties agree on the pertinent facts (plaintiffs' brief at 2-6; defendant's brief at 6) and they need not be restated in detail here. It is important to note that this lawsuit addresses only the Wisconsin no-call program, not national no-call programs administered by the Federal Trade Commission and the Federal Communications Commission. Wisconsin's no-call statute, § 100.52, effective August 30, 2001, established a non-solicitation directory of residential telephone customers who do not want to receive telephone solicitations. Customer placement in the directory is voluntary but telephone solicitor compliance with it is not. The law requires telephone solicitors to register with DATCP and pay a registration fee. Once registered, telephone solicitors receive the nonsolicitation directory (which is not a public document) and may not solicit individuals whose names are in it.

Wisconsin Statutes §100.52 directs the Department of Agriculture, Trade and Consumer Protection to administer the no-call program and to promulgate rules concerning telephone solicitor registration, the creation and maintenance of the nonsolicitation directory and the procedure for listing residential customers in the directory. In addition, Wis. Stats. § 93.07(1) grants broad authority to DATCP to promulgate "such regulations, not inconsistent with law, as it may deem necessary for the exercise and discharge of all the powers and duties of the department, and to adopt such measures and make such regulations as are necessary and proper for the enforcement by the state of chs. 93-100, which regulations shall have the force of law."

Upon completion of statutory rule-making procedures, DATCP on November 30, 2002 published the final telephone solicitation—no-call rule as Subchapter V of Wis. Admin. Code Chapter 127. The first no-call directory was sent to telephone solicitors in December 2002.

DECISION

STANDARDS FOR REVIEW OF ADMINISTRATIVE RULES

This is a declaratory judgment action for judicial review of the validity of administrative rules commenced pursuant to Wis. Stat. § 227.40. Subsection (4)(a) provides that the reviewing court "shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was promulgated without compliance with statutory rule-making procedures." In this case, plaintiffs allege no constitutional or procedural infirmity. They instead place their focus on the boundaries of the agency's authority. Review of an administrative rule begins by asking what standards govern court analysis of an agency rule, whether the agency's interpretation is entitled to any deference, whether any party bears a burden of proof, and what method of analysis should be used.

Wisconsin Statutes § 227.11(2)(a) grants administrative agencies authority to promulgate rules "interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if it exceeds the bounds of correct interpretation." And § 227.10(2) bluntly states that "[n]o agency may promulgate a rule which conflicts with state law." Both statutes provide a basis for parties challenging the validity of administrative rules on the grounds that the rule exceeds the statutory authority of the agency. *Seider v. O'Connell,*

2000 WI 76, ¶ 24, 236 Wis. 2d 211, 225. Administrative agencies have only those powers given to them by the legislature, and agencies may not issue rules that are not expressly or impliedly authorized by the legislature. *Mallo v. Wisconsin Dept. of Revenue,* 2002 WI 70, ¶ 15, 253 Wis. 2d 391, 407.

Defendants contend that the court should give "great weight deference" to DATCP's interpretation of its own authority (brief at 8-9). The Wisconsin Supreme Court has made it abundantly clear, however, that courts should apply a *de novo* standard of review in "exceeds agency authority" cases. *Seider v. O'Connell,* 2000 WI 76, ¶ 25. It would defeat the purpose of independent judicial review if courts were obligated to give great weight deference to the agency's definition of its own power. As the Court stated in *Seider,* 2000 WI 76 at ¶ 26:

> Independent review is the appropriate standard in these circumstances because it preserves the ultimate authority of the judiciary to determine questions of law, seeking to discern and fulfill the intent of the legislature . . . Our first duty is to the legislature, not the agency.

In *Wisconsin Citizens for Cranes and Doves v. Department of Natural Resources,* 2004 WI 40 (April 6, 2004), the Court reaffirmed these principles. Moreover, contrary to defendants' argument (brief at 11-12), the Court rejected the proposition that the party challenging the validity of the rule bears the burden of proof: "Unlike factual questions, or questions where legal issues are intertwined with factual determinations, neither party bears any burden when the issue before this court is whether an administrative agency exceeded the scope of its powers in promulgating a rule." *2004 WI 40, ¶ 10.*

The Wisconsin Supreme Court has adopted the "elemental" method of determining whether an agency has exceeded the scope of its authority. The court first identifies the elements of the enabling statute, then matches the promulgated rule against

those elements. *Mallo v. Dept. of Revenue,* 2002WI 70, ¶ 19. "If the rule matches the elements contained in the statute, then the statute expressly authorizes the rule. *Grafft v. DNR,* 2000 WI App 187, ¶ 7, 238 Wis. 2d 750, 618 N.W. 2d 897. However, if an administrative rule conflicts with an unambiguous statute or a clear expression of legislative intent, the rule is invalid. *Seider,* 236 Wis. 2d 211, ¶¶ 72-73." *WCCD v. DNR,* 2004 WI 40, ¶ 14. The enabling statute need not spell out every detail of the rule in order to expressly authorize it. *Grafft v. DNR,* 2000 WI App 187, ¶ 7, and the exact words used in the rule need not appear in the statute.

If the statute expressly authorizes the rule, the inquiry ends. If, however, the enabling statute does not expressly authorize the rule, the court next considers whether the statute implicitly empowers the agency to adopt the rule. *WCCD v. DNR* at ¶ 33. Ambiguous terms require a court to use canons of statutory construction to determine if the legislature implicitly authorized the rule. *Id.* at ¶ 34; *Grafft v. DNR,* 2000 WI App ¶ 9.

An administrative rule is not valid simply because it "clarifies" a statute. Need for clarification does not provide a complete justification for a rule and the agency's reliance on it sidesteps the appropriate analysis. Indeed, "clarification" is precisely the rationale the Court rejected in *Seider v. O'Connell,* 2000 WI 76, ¶ 4-5.

As noted in the Introduction, plaintiffs challenge eight separate provisions of the telephone solicitation rules as exceeding the agency's authority under Wis. Stat. § 100.52. Six of those claims relate to definitions within the rules, and they will be addressed first. The remaining two—creation of a private cause of action and increased penalties for violations—arise from the Prefatory Note to the rules, which states that the telephone solicitation provisions are adopted under both Wis. Stats. §§ 100.20(2) and 100.52

(Affidavit of James L. Rabbitt, p. 15). These claims will be addressed separately in this Decision.

I. Exemption for nonprofit organizations

The original legislation, 2001 Act 16 section 2443b, included a provision prohibiting nonprofit organizations from making telephone solicitations if a residential customer has provided notice to the nonprofit that it did not want telephone solicitations. The original legislation also defined "nonprofit organization," section 2439b. Both of these sections were vetoed by then-Governor McCallum. In addition, the governor vetoed a portion of § 100.52(1)(i) so as to delete from the definition of "telephone solicitation" the words "or to make a contribution, donation, grant, or pledge of money, credit, property, or other thing of any kind of value" (section 2819b, 2001 Wisconsin Act 16). A separate provision survived veto, however:

> 100.52(1)(j) "Telephone solicitor" means a person, other than a nonprofit organization or an employee or contractor of a nonprofit organization, that employs or contracts with an individual to make a telephone solicitation.

In his veto message Governor McCallum explained "I am vetoing sections 2439b and 2443b and partially vetoing sections 2444b and 2819b because I object to the regulation of requests for contributions by nonprofit organizations and charities."[1] The practical effect of the veto, however, whether intended or not, was to leave a freestanding reference in § 100.52 to "nonprofit organizations" without either defining the term or distinguishing between solicitations for contributions or solicitations for sales.[2]

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[1] The 2001 Wisconsin Act 16 veto message can be found at http://folio.legis.state.wi.us.

[2] None of the parties contend that the partial vetoes rendered the statute incomplete or unworkable. See: *State ex rel. Kleczka v. Conta,* 82 Wis. 2d 679, 708, 264 N.W. 2d 539 (1978), noting that cases "have repeatedly pointed out that, because the Governor's power to veto is coextensive with the legislature's power to enact laws initially, a governor's partial veto may, and usually will, change the policy of the law."

Wisconsin Administrative Code § ATCP 127.80(10) defines "telephone solicitation" as follows:

> "Telephone solicitation" means an unsolicited telephone call for the purpose of encouraging the call recipient to buy property, goods or services, or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services. "Telephone solicitation" does not include any of the following:
>
> (a) A telephone call encouraging the call recipient to buy property, goods or services from a nonprofit organization if all of the following apply:
>
> 1. The nonprofit organization complies with subch. III of ch. 440, Stats., if applicable.
> 2. Sale proceeds, if any, are exempt from Wisconsin sales tax and federal income tax.

Plaintiffs complain that this rule provision eliminates the nonprofit organization exemption from the definition of "telephone solicitor" in Wis. Stats. § 100.52(1)(j) by imposing a stringent condition on the applicability of the exemption. Plaintiffs' argument, however, confuses the purpose of the telephone call with the identity of the caller.

There is no question that the no-call statute, § 100.52, regulates conduct "for the purpose of encouraging the recipient of the telephone call to purchase property, goods or services." That is the definition of "telephone solicitation" in both the statute and the rule. On the other hand, requests for contributions or donations are not regulated by either the statute or the rule regardless of the identity of the requester. The administrative rule does not re-define "nonprofit organization" in defiance of the governor's veto; rather, it delineates the circumstances under which the *sales* activities of nonprofits are subject to regulation as telephone solicitation. Plaintiffs seem to argue that both the legislature in the original bill and the governor by his veto intended to exempt *all*

solicitation activities by nonprofit organizations, whether for sales or contributions, from the reach of the no-call statute. No reasonable reading of the statute, either pre- or post-veto, supports this contention. The veto message reinforces that the purpose was to assure that the charitable solicitation of contributions would remain untouched by the no-call program. That is the effect of both the statute as it now reads and the administrative rule. There is no conflict with Wis. Stats. § 100.52(1)(j), nor has the Department exceeded its authority by stating the circumstances under which a nonprofit organization may lawfully use telephone solicitation for the sale of property, goods and services.

II. Exemption for contact with current clients

Wisconsin Statutes § 100.52(6)(b) provides that the telephone solicitation prohibitions do not apply if "[t]he telephone solicitation is made to a recipient who is a current client of the person selling the property, goods or services that is the reason for the telephone solicitation." The statute thus describes three conditions for the exemption: (1) a pre-existing caller/client relationship; (2) a relationship that has not lapsed; and (3) the reason for the telephone solicitation.

Wisconsin Administrative Code § ATCP 127.80(2) defines "client" as follows:

> "Client" means a person who has a current agreement to receive, from the telephone caller or the person on whose behalf the call is made, property, goods or services of the type promoted by the telephone call.

Plaintiffs assert that the phrase "of the type promoted by the telephone call" adds a limitation on the subject of the solicitation that is not authorized by the statute. The court disagrees. The plain words of the statute set forth three conditions for the exemption, not two. The legislature could have simply stated that the recipient "is a current client of the caller," but it did not. It added the phrase "that is the reason for the

telephone solicitation." The phrase must modify "property, goods or services" and is reasonably read to mean that the subject of the call is limited to the property, goods or services for which the client is an existing customer—in other words, completion of the existing agreement. The administrative rule expands the exemption beyond the completion of the current agreement to allow solicitation for calls promoting sales of the "type" originally promoted. Plaintiffs' argument makes the statutory language "that is the reason for the telephone solicitation" surplusage, a result to be avoided. *State v. Circuit Court for Dane County,* 2004 WI 58, ¶ 46. In this case, the statute and the implementing rule are nearly identical and the statute expressly authorizes the rule.

III. Definition of residential customer

The no-call statute allows only "residential customers" to be listed in the nonsolicitation directory. Section 100.52(1)(f) defines residential customer as "an individual who is furnished with basic local exchange service by a telecommunications utility, but does not include an individual who operates a business at his or her residence." The administrative rule, §ATCP 127.80(10)(e), provides that the term "telephone solicitation" does not include "a telephone call made to a number listed in the current local business directory."

Plaintiffs object that the rule eliminates the statutory exclusion from the nonsolicitation directory of businesses operated from the individual's residence. But the rule and the statute address two different activities: the statute establishes who is eligible to be included on the no-call list, while the rule permits otherwise prohibited telephone solicitations if they are made to telephone numbers listed in the business directory. The rule does not contradict or conflict with the statute, nor does it in any way disturb the

statutory mandate that *only* residential customers are eligible for inclusion on the no-call list. The rule provides assurance that a telephone call to a residential customer listed in the nonsolicitation directory will not be considered a violation if that telephone number is also listed in a business directory. The legislature has expressly authorized the Department to adopt rules "necessary and proper" for the enforcement of Wis. Stats. Chapter 100 in § 93.07, and this rule properly spells out conduct that cannot constitute a violation.

IV. Registration fee structure

The enabling statute, § 100.52(3), directs the Department to promulgate rules governing the registration of telephone solicitors, including payment of a registration fee:

> The amount of the registration fee shall be based on the cost of establishing the nonsolicitation directory, and the amount that an individual telephone solicitor is required to pay shall be based on the number of telephone lines used by the telephone solicitor to make telephone solicitations. The rules shall also require a telephone solicitor that registers with the department to pay an annual registration renewal fee to the department. The amount of the registration renewal fee shall be based on the cost of maintaining the nonsolicitation directory.

Wisconsin Administrative Code § ATCP 127.81 establishes the fee structure for first and subsequent annual registrations. Subsection (3) establishes a maximum annual fee of $20,000 regardless of the number of telephone lines used to make telephone solicitations. The basic first year registration fee is $700 and $500 for each subsequent year, plus $75 for each telephone line if there are more than three lines used, § 127.81(3)(a) and (b). There are additional fees for copies of the nonsolicitation directory, subsecs. (c), (d) and (e). Section ATCP 127.81(3m) requires registrants to pay the fees in quarterly installments. Finally, § ATCP 127.81(5) authorizes the Department to reduce

or waive one or more quarterly installments in a uniform manner if fee revenues exceed expenditures by at least 15 percent.

Plaintiffs take issue with the $20,000 maximum fee because it requires smaller businesses to shoulder the costs of the no-call program. Furthermore, they assert that the rule impermissibly shifts the Department's enforcement costs to registrants. Plaintiffs do not address the provision authorizing waiver or reduction of quarterly fees.

Defendants respond that the legislature authorized fees based on the costs of creating[3] and maintaining the nonsolicitation directory, and that those costs legitimately include administration and enforcement costs. The Department points out that the legislature authorized program costs beyond just the clerical expenses of establishing and maintaining the directory by assigning all of the program's staff positions to the appropriation established by Wis. Stats. § 20.115(8)(jm). That appropriation consists of "[a]ll moneys received from telephone solicitor registration and registration renewal fees paid under the rules promulgated under s. 100.52(3)(a) for establishing and maintaining the nonsolicitation directory under s. 100.52(2)."

The relevant elements of the enabling statute, § 100.52(3), are that the fees must be "based on" the cost of "establishing" the initial directory and "maintaining" the directory once established, and individual fees must be "based on" the number of telephone lines used by the telephone solicitor. Courts are to apply the ordinary meaning of language in statutes, *Seider v. O'Connell,* 236 Wis. 2d at 228, and may consult dictionary definitions to give words their ordinary meanings. *Swatek v. County of Dane,*

[3] Defendants use the word "creating" (brief at 21-22) but the exact word used in Wis. Stats. § 100.52(3) is the cost of "establishing" the nonsolicitation directory.

192 Wis. 2d 47, 61, 531 N.W. 2d 45 (1995). The ordinary meaning of each of these terms demonstrates that the rule matches the statutory elements.

Webster's *Third New International Dictionary* defines "base," when used with "on," as "to make or form a foundation." Fees must be "based on" the initial and subsequent costs of establishing and maintaining the directory but need not be identical to those costs. They are the starting point. Similarly, the individual registration fee a telephone solicitor pays must take into account but need not correspond exactly to the number of telephone lines that the solicitor uses. Other factors may be used to fairly apportion the costs among users as long as the foundation remains the number of telephone lines. The everyday usage of "based on" allows the consideration of more than one factor in creating the intended result.

The same dictionary defines "establish" as "to bring into existence, create, make, start, originate, found or build" and "maintain" as "to keep in a state of repair, efficiency or validity: preserve from failure or decline." Plaintiffs' narrow reading of these terms would reduce the function of the registration fees to merely supporting the printing and updating of the nonsolicitation directory. The common usage of the words "establish" and "maintain" is broader, authorizing the Department to set registration fees to fund program expenses. As noted above, the appropriation language in Wis. Stats. § 20.115(8)(jm) supports the plain language of the enabling statute, § 100.52(3) by funding all program expenses through the registration fees. Statutes relating to the same subject matter should be read together and harmonized when possible. *Hubbard v. Messer,* 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 98.

The Department did not exceed its authority in establishing registration fees to support program administration and enforcement costs or in setting the $20,000 cap. Significantly, the rule provides its own mechanism for preventing overcharges of any class of users by authorizing waiver or reduction of fees under specified conditions. Wisconsin Administrative Code § ATCP 127.81(5) provides that the Department "may reduce or waive one or more quarterly installments under sub. (3m) if the department's projected fiscal-year-end cash balance in the appropriation under s. 20.115(8)(jm), Stats., exceeds the department's projected fiscal year expenditures from that appropriation during that fiscal year by at least 15%." Having established in its rule the specific conditions for fee reduction or waiver, the Department lacks authority to grant itself discretion to waive (or refuse to waive) quarterly payments when those conditions are met, i.e., when fee revenues exceed projected expenditures. To that extent, the use of the word "may" in Wis. Admin. Code § ATCP 127.81 exceeds the Department's authority.

V. Registration by individuals

Plaintiffs next contend that the Department's rule conflicts with the enabling statute by defining "telephone solicitor" to include individuals making calls who are not employees or contractors of another. Section 100.52(4)(a), Wis. Stats., prohibits telephone solicitations by an "employee or contractor of a telephone solicitor." The rule, § ATCP 127.81(1)(c), provides that "[n]o individual may make a telephone solicitation to a residential telephone customer unless the telephone solicitation is covered by a registration under this section." Plaintiffs claim that this language erases the statutory exemption for individual telephone solicitors.

Wisconsin Administrative Code § ATCP 127.80(10)(b), however, expressly states that telephone solicitation does not include a "telephone call made by an individual acting on his or her own behalf, and not as an employee or agent for any other person." This language explicitly preserves the statutory definition, and the two exceptions that follow do not contradict the statutory definition. These exceptions provide that the definition of "individual" does not include a caller who "sells or promotes the sale of property or goods for another person" or "sells or promotes the sale of goods that the caller buys from another person who controls or limits the caller's sales methods." Wis. Admin. Code § ATCP 127.81(10)(b)1. and 2.

These exceptions do nothing more than repeat the substantive definition set forth in the enabling statute: an employer/employee or contractual relationship, meaning one in which the caller is acting in concert with another person or under the control of another person. That is exactly the telephone sales conduct the statute regulates. The statute does not require a formal employment relationship or a written contract. The Department did not overstep its bounds in establishing telephone solicitor registration requirements.

VI. Definition of "solicitation" to include plan or scheme

Section 100.52(1)(i), Wis. Stats., defines "telephone solicitation" as the "unsolicited initiation of a telephone conversation for the purpose of encouraging the recipient of the telephone call to purchase property, goods or services." The administrative rule, § ATCP 127.80(10) repeats the statutory definition but adds the words ". . . or that is part of a plan or scheme to encourage the call recipient to buy property, goods or services." Plaintiffs object to the added language as impermissibly

expanding the reach of the no-call statute. They contend that the rule definition converts a business's innocent goodwill call into a violation.

Again, the starting point must be the plain language of the statute. The statute must be read to give meaning to each word. *Hubbard v. Messer,* 2003 WI 145, ¶ 9, 267 Wis. 2d 92, 98. If the legislature had intended to proscribe only the caller's direct request to purchase property, goods or services, it would have said so. Instead, the legislature added the words "for the purpose of encouraging the recipient of the telephone call to purchase." Webster's *Third New International Dictionary* defines "purpose" as "something that one sets before himself as an object to be attained" and "encourage" as "to spur on: stimulate, incite." Together these words introduce the concept that a future event is anticipated or expected to occur as a result of present action. The Department did not stray from its enabling authority by using the phrase "part of a plan or scheme" because it states the same concept.

Even if the words of the statute were ambiguous and in need of interpretation,[4] application of a familiar doctrine of statutory construction—*in pari materia*—leads to the same result. The doctrine requires courts to read, apply and construe statutes relating to the same subject matter together. *Perra v. Menomonee Mut. Ins. Co.,* 2000 WI App 215, ¶ 9, 239 Wis. 2d 26, 31. In the context of charitable solicitations, Wis. Stats. § 440.41(8) states that "solicit" means "to request, directly or indirectly, a contribution and to state or imply that the contribution will be used for a charitable purpose or will benefit a charitable organization." Section 134.73(1)(c), Wis. Stats., governing telephone solicitations by prisoners, incorporates the same statutory definition. The words "directly

[4] The plain meaning rule normally precludes resort to extrinsic aids to construction of statutes, but courts "may consult legislative history to support our reading of the plain meaning of the statute," *WCCD v. DNR,* 2004 WI 40, ¶ 8.

or indirectly" and "state or imply" suggest that the legislature intended to include a range of conduct more subtle than outright requests to purchase items.[5]

Plaintiffs' narrow interpretation of "telephone solicitor" would frustrate legislative intent, for all that a telephone solicitor would need to avoid is the direct request that the call recipient purchase goods or property. The caller could achieve indirectly what the statute directly prohibits. Accordingly, the rule does not impermissibly enlarge the statute.

VII. Promulgation of the no-call rules under the trade practices statute

The prefatory note to Wis. Admin. Code Chapter 127 states:

> This chapter is adopted under authority of s. 100.20(2), Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.20(6) or s. 100.26(3) and (6), Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20(5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys' fees. Subchapter V is also adopted under authority of s. 100.52, Stats.

The last (underlined) sentence was added when the Department promulgated the no-call rules. The Department's analysis of the proposed no-call rules cited both §§ 100.52 and 100.20(2) as statutory authority for the rules (Rabbitt affidavit, Exhibit 1, p. 10)[6].

Plaintiffs object to the Department's reliance on § 100.20(2) as a source of authority for the no-call rules. That statute authorizes the Department to issue "general orders" determining specific business trade practices or methods of competition fair or

[5] It is worth noting that Wis. Admin. Code § ATCP 127.01(22) also defines "solicitation" as a communication "in which a seller offers or promotes the sale of consumer goods or services to a consumer, or which is part of a seller's plan or scheme to sell consumer goods or services to a consumer."

[6] Wis. Stats. § 227.14(2)(a) requires the agency to provide an analysis of each proposed rule which must include reference to the statutory authority for the rule.

unfair, and to forbid unfair practices and prescribe fair practices. Subsection (5) provides:

> Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

Subsection (6) authorizes state enforcement actions to address violations of any order issued under § 100.20. The applicable penalty provisions for Wis. Stats. Chapter 100, § 100.26(6) and (3), establish civil forfeitures of $100 to $10,000 for each violation of an order issued under § 100.20, and fines and imprisonment in the county jail for intentional violations of such orders.

Plaintiffs assert that the Department's unwarranted dependence on § 100.20(2) harms them by resuscitating the private cause of action that the governor vetoed in the original bill, and by subjecting them to fines and forfeitures greater than those established in the no-call statute itself. The Department strenuously contends that it has ample authority to promulgate the no-call rules as trade practices, adding that "there is nothing in Wis. Stat. § 100.52 that limits DATCP's rulemaking authority under Wis. Stat. § 100.20" (brief at 28). The Department references the numerous trade practices rules that have already been adopted under the authority of § 100.20(2) and discusses the federal unfair trade practices criteria. This analysis, although interesting, does not address the central question plaintiffs raise: can the agency promulgate a rule that causes a conflict with a statute? The court concludes that it cannot.

Wisconsin cases establish that the legislature may delegate its authority to an administrative agency to define unfair trade practices by rule as long as those rules bear a

reasonable relationship to the elimination of unfair trade practices. *Petition of State ex rel. Attorney General, 220* Wis. 25 (1936); State *v. Lambert,* 68 Wis. 2d 523, 229 N.W. 2d 662 (1975); HM *Distributors of Milwaukee v. Dept. of Agri.,* 55 Wis. 2d 261, 198 N.W. 2d 598 (1973). The authority to issue "general orders" under § 100.20(2) includes administrative rule-making authority. *Jackson v. DeWitt,* 224 Wis. 2d 877, 888, 592 N.W. 2d 262 (Ct. App. 1999). And it was the legislature, not the agency, which placed the no-call statute in Chapter 100 of the Wisconsin Statutes, titled "Marketing and Trade Practices."

Nevertheless, agencies may not concoct rules that conflict with unambiguous statutes. *Seider v. O'Connell,* 2000 WI 76, ¶ 28. The court next considers whether the enforcement mechanisms in Wis. Stats. § 100.52 are ambiguous.

A. Penalties

Wisconsin Statutes § 100.52(10) sets the penalties for no-call violations:

> (a) Except as provided in par. (b), a person who violates this section may be required to forfeit $100 for each violation.
> (b) A telephone solicitor that violates sub. (4) may be required to forfeit not more than $100 for each violation.

The statute specifically applicable to no-call violations does not authorize fines or imprisonment, nor does it distinguish between willful and non-willful violations. It is plain on its face. On the other hand, § 100.26, the general statute applicable to violations of any order issued under § 100.20(2), provides more stringent penalties, including criminal sanctions for intentional violations.

Where a statute prescribes a specific penalty for a specific offense, the specific penalty takes precedence over a general provision. *State ex rel. Gutbrod v. Wolke,* 49 Wis. 2d 736, 747, 183 N.W. 2d 161 (1971). Moreover, the most recently enacted statute

controls and exists as an exception to a general statute covering the same subject. *Nicolet Minerals Co. v. Town of Nashville,* 2002 WI App. 50, ¶ 17, 250 Wis. 2d 831, 845. Because the penalty provision in § 100.52(10) is specific to no-call violations and more recently enacted than the general provisions in § 100.26, it prevails. The Department cannot, through its prefatory note to the rule, change the no-call statute.

The result in this case finds support in legislative history. As noted, the legislature passed a bill that provided for stronger penalties: 2003 Wisconsin Act 16, section 2446f provided that a person violating § 100.52 shall forfeit not less than $100 nor more than $500 for each violation, and a telephone solicitor or a non-profit organization making a prohibited call stood to forfeit between $1000 and $10,000 for each violation. The governor vetoed those penalties, leaving in place the letters and numbers to create a straight $100 forfeiture. The veto message states:

> I am vetoing section 2429d and partially vetoing section 2446f [as it relates to penalty amounts] to provide for penalties of $100 per violation because the penalties included in the bill are excessive. Each call in violation of the law is a separate offense, so with my veto, frequent violators face large total forfeitures while businesses that make occasional mistakes will not face penalties that could threaten their ability to remain in business.

Because the legislature did not override the partial veto, the no-call penalty provisions must remain as finally enacted.

B. Private cause of action

Section 100.52(9), Wis. Stats., provides the sole enforcement mechanism for no-call violations: "The department shall investigate violations of this section and may bring an action for temporary or permanent injunctive or other relief for any violation of this section." The statute is silent as to other methods of enforcement, including private

remedies. The prefatory note to the administrative rule, however, states that a "person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20(5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys' fees." Plaintiffs challenge the Department's authority to recognize by rule a private cause of action for violations of § 100.52.

2001 Wisconsin Act 16, section 2446b, originally included § 100.52(8), which stated:

> PRIVATE CAUSE OF ACTION. Any person who suffers damages as a result of another person violating this section may bring an action against the person who violated this section to recover the amount of those damages.

This provision, however, was also vetoed. In his veto message the governor stated:

> I am vetoing section 2446b because it is unnecessary. The bill allows the department to investigate violations and bring actions to prohibit further violations or collect forfeitures. Since individual monetary damages from telephone solicitation are generally low, the allowance of a private cause of action could encourage frivolous litigation.

In *Grube v. Daun,* 210 Wis. 2d 681, 563 N.W. 2d 523 (1997), the Wisconsin Supreme Court considered whether Wis. Stats. Chapter 144 created a private cause of action for individuals suffering damages from hazardous substance discharges. Concluding that it did not, the Court stated that there must be a "clear indication of the legislature's intent to create such a right." The court held that "a private right of action is only created when (1) the language or the form of the statute evinces the legislature's intent to create a private right of action, and (2) the statute establishes private civil liability rather than merely providing for protection of the public," 210 Wis. 2d at 689.

Neither of these tests can be met in this case. The agency cannot restore vetoed provisions by rule.[7]

DECLARATORY JUDGMENT

For the reasons stated in this Decision, pursuant to Wis. Stats. § 227.40(4)(a), the court hereby renders judgment declaring Wis. Admin. Code §§ ATCP 127.80—84 valid except insofar as the rules authorize a private cause of action and establish penalties greater than those established by § 100.52(10). In addition, the Department of Agriculture, Trade and Consumer Protection lacks authority to refuse to waive or reduce registration fees when program revenues exceed projected expenditures. In all other respects, the court declares that the Department did not exceed its statutory authority in promulgating the no-call rules.

Dated this 29th day of June 2004.

BY THE COURT

Maryann Sumi, Judge
Circuit Court Branch 2

Cc: Atty. Josh Johanningmeier
AAG Cynthia Hirsch

[7] See also: *Emergency One, Inc. v. Waterous Co., Inc.*, 23 F. Supp. 2d 959, 971-972 (E.D. Wis. 1998).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of:	)	
	)	
CONSUMER BANKERS ASSOCIATION	)	
	)	CG Docket No. 02-278
Petition for Declaratory Ruling with Respect to Certain Provisions of the Wisconsin Statutes and Wisconsin Administrative Code	)	

AFFIDAVIT OF JAMES L. RABBITT

JAMES L. RABBITT, being first duly sworn on oath, deposes and says:

1. Your affiant is an adult resident of the State of Wisconsin.

2. Your affiant has been employed since 1988 with the Division of Trade and Consumer Protection in the Wisconsin Department of Agriculture, Trade and Consumer Protection (the "Department"), with offices at 2811 Agriculture Drive, Madison, Wisconsin.

3. During his employment with the Department, your affiant served as a consumer protection investigator, investigator supervisor, policy program analyst, and acting division administrator. Your affiant has been the Director of the Bureau of Consumer Protection since 2004.

4. The Wisconsin Legislature created the Wisconsin No Call program by promulgating Wis. Stat. § 100.52 on July 1, 2001. As part of this law, the Legislature directed the Department to promulgate administrative rules to interpret and administer the Wisconsin No Call program.

5. Accordingly, between July 1, 2001, and December 1, 2002, your affiant directed and participated in the administrative rule process that resulted in the Department's promulgation of the Wisconsin Administrative Code Chapter ATCP 127, Subchapter V.

6. As part of the administrative rule process, the Department held over 15 public hearings and listening sessions concerning the proposed administrative rule in 6 different locations throughout the state of Wisconsin.

7. During the hearings, over 300 persons testified either in person or by submitting written testimony. The individual consumers and consumer groups that submitted testimony either supported the No Call rules that were eventually adopted, or supported rules that more restrictively limited businesses' ability to make telemarketing calls to former customers on the No Call list. Some businesses also testified in support of the adopted rules.

8. During meetings with the chairs of the legislative committees charged with review of the final draft rules, AT&T requested and supported the interpretation of the "current client" exception that was eventually adopted in the administrative rule. AT&T said that companies should only be allowed to call current clients to sell goods or services which are of the type currently provided to the client. Otherwise, AT&T stated, local

telephone companies, which have a much larger customer base than long distance telecommunications providers, would have an unfair competitive advantage when telemarketing different new services, such as long distance services, to its customers.

JAMES L. RABBITT

Subscribed and sworn to before me
this 31st day of January, 2005.

Notary Public, State of Wisconsin
My commission: permanent.